



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
FEC PRESS OFFICE
FEC PUBLIC DISCLOSURE *MWD*

FROM: COMMISSION SECRETARY

DATE: May 24, 2006

SUBJECT: SUPPLEMENTAL COMMENT: DRAFT AO 2006-19

Transmitted herewith is a late supplemental comment from Messrs. Joseph E. Sandler and Neil P. Reiff regarding the above-captioned matter.

The proposed draft advisory opinion is on the agenda for Thursday, May 25, 2006.

Attachment

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May 24, 2006

The Honorable Michael E. Toner
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Supplemental Comments on AOR 2006-19

Dear Chairman Toner:

On Monday, May 22, 2006, our firm filed extensive comments regarding the OGC draft in the above mentioned Advisory Opinion Request. We have just been made aware of comments and supplemental comments by Democracy 21 and the Campaign Legal Center ("commenters"). Having reviewed those comments, we feel compelled to submit the following supplemental comments and request consideration of those comments as late-filed, to ensure that the discussion and debate surrounding this request is fair, honest and accurate.

In their supplemental comments, Democracy 21 and the Campaign Legal Center claim that even if the Commission determines that the proposed communications do not constitute "federal election activities" the requesting local party committee would still be required to pay for those communications with a combination of federal and non-federal dollars. This assertion is patently incorrect and not in accord with the Commission's regulations. Each of these communications exhort the reader or listener to vote for specific non-federal candidates and do not exhort the listener to vote for the Democratic "ticket" or reference any federal candidates. Nor do they constitute "get-out-the-vote" as defined by the Commission's regulations or any other "federal election activity" 11 C.F.R. § 100.24(a).

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Specifically, commenters cite to 11 C.F.R. § 106.7(c)(5) for the proposition that the activities undertaken in connection with this request are allocable: "expenses for voter identification, voter registration, and get-out-the-vote drives, and any other activities that urge the general public to register to vote...*that do not qualify as Federal election activities*, must be paid with Federal funds or may be allocated between the committee's Federal and non-Federal accounts." (emphasis added in original). Unfortunately, the commenters have conveniently omitted language within the regulation that renders it inoperable in this instance. Where commenters inserted "...", in their quotation of the regulations, "..." states "or that promote or oppose a political party, without promoting or opposing a candidate or non-Federal candidate." Since the proposed communications in this request do, in fact, expressly advocate the election of only non-federal candidates, the cited regulation is inapplicable on its face and this *convenient* omission by the commenters misstates the application of the regulation. Ultimately, the purpose of this regulation is to ensure that "generic" party activities that do not otherwise reference candidates or otherwise meet the definitions of "federal election activity" are paid for with a combination of federal and non-federal funds.

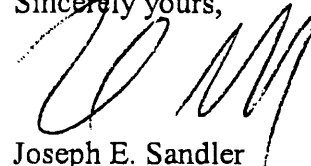
Rather, the appropriate analysis in this request derives from 11 C.F.R. § 100.24(c)(1), which exempts such express advocacy communications for non-federal candidates that are not otherwise "federal election activities" from the underlying definition of "federal election activity." In its Explanation and Justification during the promulgation of this regulation, the Commission noted: "In BCRA, Congress specifically excluded certain activities from the definition of Federal election activity. 2 U.S.C. § 431(20)(B). Activities falling within one of the exceptions may be paid for with entirely non-Federal funds." Explanation and Justification, Prohibited and Excessive Contributions: Soft Money; Final Rule, 67 Fed. Reg. 49064, 49070 (July 29, 2002) (emphasis added). Thus, unless a communication that expressly advocates the election or defeat of a non-Federal candidate otherwise qualifies as a "federal election activity," the Commission has advised that such communications may be paid for solely with non-Federal funds. Therefore, the regulation cited by commenters is clearly inapplicable.

Although we had no intention to file any additional comment in connection with this request, we felt compelled to submit this letter after a review of comments filed by Democracy 21 and Campaign Legal Center to correct their blatantly incorrect and misleading representations regarding the Commission's regulations. Therefore, we request that the Commission suspend its rules and agree to consider this late filed comment.

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If you would like to discuss the matters addressed in this letter, or any other issues regarding this opinion, feel free to contact our office at (202) 479-1111.

Sincerely yours,

A handwritten signature in black ink, appearing to be a combination of the initials 'JR' and 'MR' or similar, written in a cursive style.

Joseph E. Sandler
Neil P. Reiff

cc: Robert D. Lenhard, Vice Chair
David M. Mason, Commissioner
Hans A. von Spakovsky, Commissioner
Stephen T. Walther, Commissioner
Ellen L. Weintraub, Commissioner
Mary Dove, Commission Secretary